

1 he got from the jury was sizable and represented all  
2 of the damages he was ever likely to recover in light  
3 of the pre-trial rulings in this case. Obviously, had  
4 we been permitted to proceed on the theories espoused  
5 in the first expert report, we would have argued for a  
6 different number.

7 Q I am showing you Exhibit 23.

8 (Thereupon, Hare Deposition Exhibit No. 23  
9 was marked for identification.)

10 Q This is a document that purports to be a  
11 letter. Attached to it is a mediation statement, to  
12 Albert T. Carlisle.

13 Was this a document that you had prepared,  
14 that is the mediation statement prepared for the Third  
15 Circuit, as a consequence of the mediation  
16 proceedings?

17 A Yes, it is.

18 Q And by reading this, it refreshes your  
19 recollection that Matson did take an appeal, and  
20 summarizing the issues, among, other things that were  
21 presented on appeal; is that correct?

22 A It appears, yes.

23 Q Among other things.

24 A I'm not sure to what extent I was  
25 characterizing Matson's issues on appeal. I just

1 don't recall as we sit here.

2 Q In the documents itself, I want to first of  
3 all address the Carlisle settlement position.

4 A Pardon me?

5 Q I want to address Carlisle's settlement  
6 position discussed on page 5.

7 A Okay.

8 Q You prepared this; is that correct?

9 A That's right.

10 Q And what was the amount of damages that you  
11 were requesting in this mediation document?

12 A It appears that we indicated that we would  
13 agree to settle for the same terms that we had  
14 proposed during the pre-trial mediation.

15 Q Maybe we can refer to page 6.

16 A Right. Matson leaves the property and pay  
17 \$5 million.

18 Q It was a demand that you were making on  
19 behalf of Mr. Carlisle. This would have been three  
20 months or four months post verdict?

21 A Roughly, yes.

22 Q And with regards to the \$5 million that was  
23 being claimed in the settlement demand, again, did you  
24 perceive that to be a reasonable demand?

25 A I perceived that demand to be a well-

1 calculated demand to try to prompt settlement  
2 negotiations.

3 Q Okay.

4 A I didn't anticipate that Matson would agree  
5 to pay \$5 million.

6 Q What kind of response in a dollar amount  
7 were you hoping to elicit by making a \$5 million  
8 demand?

9 A I was hoping to get Matson to leave the  
10 property.

11 Q So from a standpoint of the components that  
12 made up the \$5 million demand now post-trial, did they  
13 change at all pre-trial to post-trial?

14 A That's the same number. Again, I'm not  
15 sure to what extent there were "components," to use  
16 your terms. It's the same dollar amount that we had  
17 demanded pre-trial.

18 Q I notice in the upper part of page 6, there  
19 was a reference that says, "Although Matson does not  
20 yet know this fact, Carlisle intends to file another  
21 lawsuit in state court to recover for the damages that  
22 Matson has caused the property by reason of careless  
23 harvest practices"; is that correct?

24 A Right.

25 Q With regards to -- and then you go on and

1 state, "For example, Matson has caused tons of topsoil  
2 to wash into Spring Creek, has placed skid trails in  
3 and through the Clough Farm streams, and has generally  
4 damaged the land and the health of the forest."

5 Did you have an idea at least at the time  
6 that you prepared this letter that there was a dollar  
7 amount of damage that could be claimed that would fit  
8 within that category?

9 A That could be claimed, sure.

10 Q What was the dollar that could be claimed?

11 A Any dollar number you want to assign to it.

12 This is the same thing that I described before as  
13 being in my view not likely to lead to any substantial  
14 jury award.

15 Q Understood. I was just trying to find out  
16 if you had a specific dollar amount?

17 A No. No.

18 Q And at least at this point in time period,  
19 was it your understanding in March of 1998 that you  
20 were going to re-file the second action on  
21 Mr. Carlisle's behalf?

22 A Correct.

23 Q And it was going to be re-filed in state  
24 court; is that correct?

25 A That is correct.

1 Q So you were in Warren County on several  
2 occasions with regards to the Carlisle claim; is that  
3 correct?

4 A With regards to the Carlisle claim and for  
5 social get-togethers.

6 Q Again, for completeness, on any of those  
7 occasions, did you go to the courthouse or the  
8 recorder of deeds?

9 A I am going to have to give you the same  
10 answer I gave you before. I don't believe so.

11 (Thereupon, Hare Deposition Exhibit No. 24  
12 was marked for identification.)

13 Q I am showing you, Mr. Hare, what has been  
14 marked Exhibit 24. It purports to be a letter of  
15 June 23rd, '98 to Lainard Bush; is that correct?

16 A Correct.

17 Q Just give me the background or the purpose  
18 of that letter?

19 A This is to transmit to Lainard for filing  
20 in the Court of Common Pleas of Warren County, a  
21 prb.rit of summons that I prepared on Bert's  
22 behalf.

23 Q And this was to initiate the second action  
24 that we talked about with respect to that other  
25 document; is that correct?

1 A That's correct.

2 Q And was there some urgency at that time  
3 period from your perspective for that second action to  
4 be re-filed?

5 A Not that I recall.

6 Q So there wasn't any time constraint?

7 A Not that recall.

8 (Thereupon, Hare Deposition Exhibit No. 25  
9 was marked for identification.)

10 Q I'm going to show you what has been marked  
11 as Exhibit 25. I'd like to see if you can identify  
12 that document if you would.

13 A This is a copy, although it's been  
14 obviously attached as exhibits in other proceedings, a  
15 copy of the filed pr(a)rit of summons, the  
16 unsigned, unfiled original or draft of which was  
17 enclosed in Exhibit 24.

18 Q If I understand it correctly, the actually  
19 typewritten portion of that document, that would have  
20 been prepared under your supervision?

21 A In fact, I probably did the key stroking.

22 Q And with regards to the claim or claims  
23 that were being included under this writ of summons,  
24 why don't you tell me what you perceived to be the  
25 claim or claims that would have been covered by the

1 summons?

2 A Anything under the sun. Pennsylvania State  
3 Court writ of summons standing alone does not identify  
4 the claims being asserted.

5 Q And with regards to your perception, with  
6 regards to the potential claims that Mr. Carlisle had  
7 that would be that were dismissed from the prior  
8 action, which of those claims would have been included  
9 in this particular writ of summons?

10 A Any or all of them. The objective was that  
11 this would be the action in which he proceeds with the  
12 trespass claims. Certainly, this could -- this action  
13 could be a vehicle for him to assert any other claims  
14 that he believed he had, including any new claims that  
15 may have arisen since the day of the verdict.

16 Q Okay. Now, the reason why I asked you if  
17 there was any you were referring to, I see in the  
18 second sentence of the first paragraph, it says, "The  
19 filing of this pr(2)initiate a new lawsuit on  
20 Bert's behalf against Matson" --

21 A I'm sorry. Are you looking at the letter?  
22 Okay.

23 Q -- "and toll the running of any statute of  
24 limitation."

25 A Right. That's what a writ of summons --

1 I mean, that's the effect that a writ of summons has.

2 Q Understood. What statute of limitations  
3 were you referring to in that letter, if you recall?

4 A I say, "toll the running of any statute of  
5 limitations," so any statute of limitations.

6 Q Okay. Were you concerned about any  
7 particular statutes of limitations, in the latter part  
8 of June of 1998 that had you thought were particularly  
9 relevant to any claim or claims that Mr. Carlisle had?

10 A Not in particular, other than, as I recall,  
11 I wanted to -- if I remember, there may be an issue  
12 under federal rule 41 to filing within a year after  
13 the filing of the stipulation. I'm not -- I don't  
14 recall about that.

15 Q Let me just pursue that for a second. In  
16 your mind, did the effect of filing this writ of  
17 summons in June '98 save or resurrect any of the  
18 claims that you filed in the previous complaint for  
19 purposes of the statute of limitations?

20 A Well, I believe that most of the claims he  
21 filed in his complaint had been litigated. To the  
22 extent we dismissed count V, I believe that the filing  
23 of the prii.rit of summons effected a tolling  
24 or a savings with regard to the running of the statute  
25 on count V.

1 Q Okay. That was the, as I recall, trespass  
2 claim?

3 A Correct.

4 Q And just again, for purposes of  
5 completeness, would that also fall under the statute  
6 of limitations that the conversion claim you may have,  
7 recognizing that conversion and trespass are sometimes  
8 considered the same?

9 A The answer is I don't know. I don't recall  
10 ever giving thought to that question.

11 Q Okay. Okay. The other part of the  
12 question I have is, there is a reference in the second  
13 paragraph about signing the pr(i)rt's behalf  
14 and taking it to the courthouse for filing.

15 If there wasn't any urgency in filing, why  
16 were you asking Mr. Bush to do that?

17 A If you don't -- I'm not sure. I'm not sure  
18 there was any urgency, but I can tell you the reason  
19 I'm asking Lainard Bush to do that is, first of all,  
20 my understanding was that Bert had authorized him to  
21 do that. And secondly, Lainard was sort of the artist  
22 and resident on Bert's property in Warren County.  
23 Bert lives in Ashtabula County. It's almost two hours  
24 away. It was much easier for Bert if Lainard would  
25 sign the priii.ake it to the courthouse for

1 Circuit.

2 And the subject matter of these notes -- by  
3 the way, Exhibit 28 are my notes of a phone call with  
4 Adam Freid who I believe is or was an associate of  
5 Mr. Krembs. This likewise was in the summer of '98.  
6 It probably is within a few weeks after I sent the  
7 prc.rit of summons to Lainard Bush. Peter  
8 took the view and his associate Adam Fried took the  
9 view, as I understand it, that the dismissal without  
10 prejudice under rule 41 was not effective to toll the  
11 statute of limitations under the Pennsylvania savings  
12 statute. And that's the position that they expressed  
13 to me in a couple of phone calls.

14 Exhibits 26 and 27 appear to be notes that  
15 I made in doing some research on the question under  
16 the Pennsylvania statute, title 42, section 5335. I  
17 see notes of a couple of cases that I had looked at.  
18 And then my phone call with Adam Freid came later.  
19 Peter Krembs raised this issue with me that in his  
20 view, our stipulation was not effective to toll the  
21 statute of limitations. He raised that I think the  
22 first time we spoke. Then in follow-up conversation,  
23 I spoke with Adam Fried. And Exhibit 21 -- pardon  
24 me -- 28 is a copy of my notes of my conversations. I  
25 think I had two with Adam. This would have been one

1 of my phone calls with Adam Freid regarding this  
2 issue. You can see, I got topic 1 here, q. "Re: Sol +  
3 tolling statute," statute of limitations.

4 I think Peter had asked Adam to research  
5 the same question. And here they are in the summer of  
6 1998. At this point, their Bert's attorneys and  
7 they're saying that in their view this strategy of the  
8 rule 41 stipulation followed by a subsequent filing  
9 was not effective to toll the statute of limitations.

10 Q Is your conclusion different than theirs?

11 A I concluded to the contrary, that's  
12 correct.

13 (Thereupon, Hare Deposition Exhibit No. 29  
14 was marked for identification.)

15 Q Okay. Okay. And the statute that you were  
16 interpreting was it not, what is marked as  
17 Exhibit 29? You mentioned that.

18 A Forgive me. I will come to 29.

19 I talked about a one-year issue under rule  
20 41. Here is what I'm referring to. Under the saving  
21 statute, 5535, the statute of limitations is tolled if  
22 the action, the same cause of action, is filed within  
23 one year after termination.

24 So let me just supplement my answer. There  
25 was no urgency in that regard in connection with

1 getting dry. Those circumstances include or are a  
2 proceeding action or an action proceeding terminated  
3 by a voluntary non-suit. A voluntary non-suit is a  
4 specific device in the Pennsylvania rules of civil  
5 procedure. A discontinuance is a specific device.  
6 Dismissal for neglect to prosecute, or a final  
7 judgement on the merits, none of these is a rule 41  
8 stipulation for dismissal. So the exclusion, in my  
9 view, does not apply.

10 Q So the consequences -- the bottom line is,  
11 the consequences of rule 41, what we will call a rule  
12 41 dismissal and the consequences of your  
13 interpretation of that situation, whatever trespass  
14 claims you had in -- articulated in count V of the  
15 original cause of action were re-filed in that writ of  
16 summons?

17 A Actually, they were preserved by the  
18 two-part effect of a dismissal without prejudiced,  
19 coupled with a timely re-filing within the period  
20 allowed by the savings statute.

21 Q And that was defined by a year, so that was  
22 timely in June of '98; is that correct?

23 A That is certainly my view.

24 Q In addition to --

25 A Peter Krembs disagreed.

1 Q Just for purposes of completeness, does  
2 that also include the re-filing of any conversion  
3 claims?

4 A It would be a re-filing of anything that  
5 had been dismissed on any basis other than those in  
6 the exclusionary paragraph.

7 By the way, I don't believe that there was  
8 a dismissal of a conversion count. I think that was  
9 the premise of your question. I don't believe.

10 Q There was a withdrawal of the conversion  
11 count, was there not?

12 A No. There is no rule 41 stipulation on the  
13 docket with respect to count 7. The colloquy with the  
14 judge was to the effect that we were withdrawing, from  
15 the jury's consideration, the need to discern which  
16 trees were cut within two years because we got all of  
17 those same damages under a breach of contract claim,  
18 which is a 20-year statute.

19 Q That had the effect of allowing the jury to  
20 consider any type of conversion claim, did it not?

21 A It had the effect of us not needing to  
22 puzzle over this unanswerable question. I don't know  
23 what other effect --

24 Q Let me just say it another way.

25 For all intents and purposes, as a

1 consequence of withdrawing the conversion claim, as  
2 you have indicated, that conversion claim was not  
3 presented to the jury, was it?

4 A I don't know. I don't recall what charge  
5 the court gave the jury. That may be in the record.

6 Q And just for purposes of completeness, was  
7 the summons that you filed broad enough to include any  
8 conversion claim that you had articulated in  
9 Count VII?

10 A A pr(1)rit of summons is broad  
11 enough to include every claim under the sun.

12 Q Including the conversion claim that was  
13 encompassed within count VII?

14 A Sure. If he had wanted to, after the  
15 filing of this pr(2)his writ of summons,  
16 Bert Carlisle could have filed this same complaint,  
17 word-for-word, and every count in there. He would  
18 have encountered, I think, a ruling that he has res  
19 adjudicata as to those issues that have already been  
20 decided.

21 Your question is, is this writ of summons  
22 broad enough to include any particular claim. This is  
23 broad enough to include any conceivable claim in the  
24 universe.

25 Q Did you discuss with him at any time, at

1 the time of dismissal or withdrawal, any of the  
2 counts, if there was a risk that any re-filed claim  
3 would meet res adjudicata or exceed the statute of  
4 limitations?

5 A I discussed with him when we contemplated  
6 preparing and filing the rule 41 stipulations, the  
7 issues surrounding the statute of limitations, and my  
8 view and my reading of the statute to the effect that  
9 the statute would be tolled. Now this of course goes  
10 back on a tort claim to the date two years prior to  
11 the filing of the federal court action, that statute  
12 would be tolled provided he filed a second action  
13 within one year.

14 So yes, we talked about the statute of  
15 limitations. I don't believe we discussed collateral  
16 estoppel because we proceeded on the other counts.  
17 And naturally, there's an estoppel as to those issues.

18 Q There's a reference to a case called  
19 Maxwell Downs. You might want to see that.

20 A I noticed those in these notes.

21 (Thereupon, Hare Deposition No. 30 was  
22 marked for identification.)

23 Q Downs v. Philadelphia.

24 Just for purposes of completeness, is that  
25 a case that he had brought to your attention?

1       A     I think, I believe, it is a case that Adam  
2 Fried cited, I think. These are notes of my phone  
3 call with him. I suspect this is a cite that he  
4 identified to me during that phone call.

5       Q     Just for purposes of completeness, I can  
6 assure you that that appeared at the 162  
7 PA Commonwealth cite. The cite is really unimportant  
8 to my question.

9               Is that a case that you read in the context  
10 of talking to the associate of Peter Krembs?

11       A     He cited this case to me, I believe, as I  
12 just said. I don't recall whether I read it  
13 afterwards or not, because by this point, we were no  
14 longer representing Bert.

15       Q     Understand. Okay. I wanted to find out if  
16 you had any recollection with regards to it.

17               Let me then go forward a second. Maybe we  
18 can do this in an expeditious manner.

19       A     Forgive me. I'm not sure, in fact, whether  
20 we were still representing Bert in June of '98 when I  
21 prepared --

22       Q     I'm not saying you did. Let me see if I  
23 can do it this way.

24               We don't have a beginning date of your  
25 representation of Mr. Carlisle, but we know it was

1 some time in the fall of '94; correct?

2 A Correct.

3 Q And probably the best evidence of the  
4 formal retention would be the retention letter or the  
5 fee agreement; is that correct?

6 A I agree.

7 Q We don't have that request. Maybe at some  
8 later date, we can find that.

9 Do I understand that you then would have  
10 been representing Mr. Carlisle with regards to what I  
11 call the Matson timber claims between that we have  
12 been talking about here today, continuously, from  
13 whatever it was, all the way up until mid June of '98?

14 A As I recall, that's correct.

15 Q And then to expedite things, there was a  
16 delinquency by Mr. Carlisle to pay some or all of your  
17 bills; is that correct?

18 A There were many various times,  
19 delinquencies, sometimes running longer than a year at  
20 a time.

21 Q And then triggering the letter in mid June  
22 of '98 that for all intents and purposes was a letter  
23 to Mr. Carlisle saying that you were separating and  
24 you could no longer work with Mr. Carlisle because of  
25 the money due for legal services; is that correct?

1 what the urgency was in the summons?

2 A Well, whether this was of any consequence  
3 or not is a separate question. What I'm suggesting to  
4 Bert is that as of June 27th, 1989, the Pennsylvania  
5 20-year statute of limitations with respect to  
6 contracts under seal was going to be repealed. And  
7 all contracts, whether under seal or otherwise, would  
8 be subject to the ordinary four-year statute of  
9 limitations. My suggestion to him was to get the most  
10 possible bang for your buck, you want to file this  
11 prd.rit of summons prior to the repeal of  
12 that statute to keep all of your options open.  
13 Obviously, a 20-year statute has no bearing on a  
14 trespass claim which is separate -- subject to a  
15 separate two-year statute of limitations. I'm saying  
16 to him, if you want to continue your offensive against  
17 this timber company and keep all of our options open,  
18 you might want to get this filed before that statute  
19 is repealed.

20 Q And it was your perception that the  
21 trespassing conversion claims were protected by the  
22 tolling statute, that is, the trespass conversion  
23 claims that were not submitted in the federal court  
24 proceedings were preserved by the tolling statute by  
25 filing within one year of the dismissal in federal

1 court?

2 A I'm not sure anyone had in mind proceeding  
3 further on a conversion claim. I don't think that was  
4 in the discussion anywhere. Certainly, with respect  
5 to the trespass claim, that's correct.

6 Q Now, let me see if we can maybe address the  
7 billing issue in the June 15, 1998 letter. It looks  
8 like there was a balance due of about \$15,000, \$15,768  
9 that was due at that time; is that correct?

10 A That's what the letter reflects.

11 Q Let me then do this in a way that would  
12 save some time. Let's go off the record for a  
13 second. Maybe I can save some time here.

14 THE VIDEOGRAPHER: We are off the record.

15 The time is 3:11 p.m.

16 (Discussion off the record.)

17 THE VIDEOGRAPHER: We are on the record.

18 The time is 3:27 p.m.

19 (Thereupon, Hare Deposition Exhibit No. 32  
20 was marked for identification.)

21 BY MR. CONNER:

22 Q Mr. Hare, possibly we can go through the  
23 summary document that we just previously handed you.  
24 And if you would just hand me the document, I lost  
25 track of the exhibit number.

1 A 32.

2 Q So that we're on the same page, we have  
3 prepared a summary. And I'm not asking you to agree  
4 or not agree with the summary.

5 Generally speaking, is at least the  
6 billings starting on 12/7/94 through the 3/17/99 time  
7 period consistent with your recollection with billing  
8 documents that would have been dated, forwarded to  
9 Mr. Carlisle for payment for services in regard to the  
10 timber?

11 A As a general manner, that's right.

12 Q And we have totaled those. And we have, as  
13 I represented before, all the underlying documents and  
14 did total them as being charges of \$46,244.56.

15 Is that approximately what you recall the  
16 total billings were?

17 A That sounds approximately correct.

18 Q And then we also have listed the payments  
19 that were either made by Mr. Carlisle or on behalf  
20 Mr. Carlisle starting with the February 27, '95 time  
21 period through the 5/4/99 time period totaling  
22 \$45,319.19, which left a difference of about \$925.37.

23 Does that generally coincide with your  
24 recollection of the payments you received?

25 A Painting with a broad brush, sure. I don't

1 payment.

2 Q Do you have any recollection of discussing  
3 the matter with Peter Krembs? I'm talking about the  
4 specific dollar amount.

5 A Yeah, he tried to beat me up on my bill.  
6 We talked probably three or four times about that.

7 Q And do you recall coming to the conclusion  
8 with Mr. Krembs that you would accept \$16,635 as  
9 payment in full?

10 A Evidently we did. I don't recall that.

11 (Thereupon, Hare Deposition Exhibit No. 34  
12 was marked for identification.)

13 Q Let me then just proceed through the  
14 remaining exhibits. Exhibit 34 purports to be the  
15 bill that Mr. Bruzzese submitted for the consultation  
16 work that he did?

17 A Right. During the month of December '97,  
18 as I indicated earlier, he provided some assistance in  
19 the final pre-trial preparation.

20 Q Without trying to go thorough the  
21 individual documents, do you recall whether or not you  
22 billed that under the billing head of your firm,  
23 Bartony & Hare, or did you bill that separately?

24 A I don't recall.

25 Q To the best of your knowledge, was

1 to the \$17,000 number, at least best of your knowledge  
2 is accrual of interest on the outstanding balance?

3 A I believe it is, in part, interest. I  
4 suspect there were additional billings, because --

5 Q Between January of '98 and the time of that  
6 letter? The reason I say that, I thought you said  
7 that you were out of the case?

8 A We withdrew in June of '98. I don't know  
9 whether we generated an invoice after that date for  
10 services let's say in the month prior to our  
11 withdrawal. The billing records in any case would  
12 reflect that.

13 Q It will reflect -- all of those copies and  
14 files will speak for themselves.

15 You don't recall one way or the other as to  
16 whether or not that in fact bills for the letters that  
17 he sent to Lainard Bush?

18 A I don't think I billed for that.

19 There's also a reference, incidentally, in  
20 this letter to the real estate matter, the separate  
21 real estate matter in which Mr. Carlisle owes us  
22 money. I don't know what that is though. I think he  
23 had asked my partner to look at some issue on another  
24 property. I forget.

25 Q You know, earlier on in the deposition, I

1 asked you whether you knew Bob Gabrich from Ashtabula?

2 A Right.

3 Q And Bob Gabrich, I think as you recall, was  
4 a CPA in Ashtabula?

5 A That sounds right.

6 Q Between the time of the jury verdict in  
7 December of '97 and June of '98, did you ever attend a  
8 meeting with Mr. Carlisle and Mr. Travis and  
9 Lainard Bush? Do you have any recollection of  
10 attending --

11 A I have no idea. It's certainly possible.

12 I don't recall. A meeting on what topic?

13 Q I'm not talking about the general topics we  
14 talked about today, the dismissal of the claims in  
15 federal court and the prospects or possibilities of  
16 re-filing those claims in the state court system?

17 A It's possible. I can't imagine why an  
18 Ashtabula County accountant would be participating in  
19 a meeting on that topic, but I can't say either way.

20 Q So, how about with regards to Bert, how  
21 many times did you meet with Bert and Lainard Bush  
22 from -- I'm talking about after the time that the  
23 verdict came in federal court in Pittsburgh and June  
24 of '98. How many meetings were there in the  
25 intervening period of time?

1 very much our strategy.

2 Q What were the representations that you made  
3 to them in this time period of March of '98?

4 A I can't say whether I made representations.

5 I suspect that to the extent we discussed the subject,  
6 the discussion was along the lines that we would file  
7 a second action in state court and continue to bring  
8 proceedings against Matson Lumber Company, keeping in  
9 mind, that at this point, we were still in litigation  
10 with them, albeit as the appellant in an appeal from a  
11 successful jury verdict.

12 Q Did you provide him any information at that  
13 time? I'm talking about the Third Circuit mediation.  
14 We know that you provided Mr. Carlisle a copy of the  
15 documents you submitted when you were litigating; is  
16 that correct?

17 A Right.

18 Q And did you provided any information at  
19 that time or any of the later times prior to  
20 withdrawal from representation of Mr. Carlisle that  
21 there was a qualifier or limitations on his right to  
22 recover up to the \$5 million calculation you were  
23 demanding in mediation?

24 A I don't understand your question.

25 Q You may recall, in your mediation document

1 that you submitted there was a demand for \$5 million.

2 Did I read that correctly?

3 A Right.

4 Q And I'm only asking whether or not either  
5 at the time that was submitted or any time between  
6 that time and the time that you ceased representing  
7 Mr. Carlisle in June '98, did you provide any  
8 information or advice that qualified his right to \$5  
9 million of damages?

10 A I never said he had a right to \$5 million  
11 in damages. We made a settlement demand at various  
12 times before trial and after trial for \$5 million.  
13 I'm not convinced that Bert had the right or the  
14 likelihood of recovering \$5 million. I have a hard  
15 time responding to your question in that fashion.

16 Q Just for purposes of completeness, was  
17 there a lesser dollar amount than \$5 million that was  
18 greater than zero that you thought Mr. Carlisle had a  
19 right to, as to what would be a reasonable recovery in  
20 the re-filed action?

21 A Again, he wanted to bring some proceeding  
22 in which he made a claim for a home run damage award.  
23 The second action was going to be -- at the time we  
24 proceed in that fashion, the second action was going  
25 to be the venue in which he made that claim.

1           A       I'm sorry. I'm looking at Peter Krembs'  
2 name. It's a letter from Chet Fossee to Peter Krembs  
3 reporting that he has got the funds to pay the  
4 judgment, and it is copied to me. I have entirely  
5 misspoken. I'm sorry.

6           Q       That's a May 1999 letter?

7           A       No. This time I can disagree with you.

8 It's an April 1999 letter.

9           Q       April, what date?

10          A       April 28th.

11          Q       And as I understand it, that was the report  
12 that the settlement or the verdict was being paid or  
13 had been paid by Matson; is that correct?

14          A       It's Chet Fossee's notice to Peter Krembs,  
15 Bert's lawyer, that Chet has in his possession a check  
16 payable to Bert's counsel in satisfaction of the  
17 judgement. And it appears that this check also  
18 includes payment of accrued interest on the judgment.  
19 I think the judgement was \$110,000, and Chet is  
20 referencing a judgement for \$119,000 and change.

21          Q       And you received your check for \$16,700  
22 within a week of that letter; is that correct?

23          A       Peter's check to us is dated approximately  
24 a week later, and I trust that I received it some time  
25 thereafter.

1 utterly no idea what this is.

2 Q I believe that would be --

3 MR. CONNER: Let's just take a little break  
4 here and save some time. Let's go off the  
5 record.

6 THE VIDEOGRAPHER: We are off the record.

7 The time is 3:52 p.m.

8 (Discussion off the record.)

9 THE VIDEOGRAPHER: We are on record. The  
10 time is 3:59 p.m.

11 BY MR. CONNER:

12 Q Mr. Hare we have marked for the record some  
13 deeds and some documents that you may or may not have  
14 seen. And we already went through them. For purposes  
15 of completeness, we want to make sure that we  
16 understood what you knew, if anything, about these  
17 documents.

18 (Thereupon, Hare Deposition Exhibit No. 41  
19 was marked for identification.)

20 Q I want to show you what's been marked as  
21 Exhibit 41. And this purports to be an agreement  
22 between Marion Kinkead and Fisher & Young, an article  
23 of agreement from April 1, 1968.

24 Can you tell us whether or not, as part of  
25 your investigation of you representing Mr. Carlisle,

1 you have ever seen that document?

2 A I don't recall.

3 Q If you had obtained that document as part  
4 of your investigation, would that have been retained  
5 in your file documents?

6 A In all likelihood.

7 Q Okay. I'd like to then just do the same  
8 thing with other documents that we have.

9 (Thereupon, Hare Deposition Exhibit No. 42  
10 was marked for identification.)

11 Q I want to show you what has been marked as  
12 Exhibit 42. And this is a deed from Marion Kinkead to  
13 Fisher & Young, and I believe it's dated the 27th of  
14 March 1969. It says it was recorded in April of 1969.

15 Take a moment and look at that document and  
16 tell us whether or not as part of your investigation  
17 in representing Mr. Carlisle you had ever seen that  
18 document?

19 A I don't recall.

20 Q And the same question, if you had obtained  
21 that document as part of your investigation, would you  
22 have retained that in your file?

23 A In all likelihood.

24 (Thereupon, Hare Deposition Exhibit No. 43  
25 was marked for identification.)

1 Q I'm showing you what's been marked as  
2 Deposition Exhibit 43. This purports to be an April  
3 1, 1968 article of agreement between Marion Kinkead  
4 and Fisher & Young.

5 Same question, can you tell us whether or  
6 not as part of your investigation or representation of  
7 Mr. Carlisle you had ever seen that document?

8 A I don't recall, but I don't think so.

9 Q With regards to -- I show you what is  
10 marked -- again, if you had obtained that document as  
11 part of your investigation, would you have retained it  
12 in your file?

13 A I would have certainly attempted to.

14 (Thereupon, Hare Deposition Exhibit No. 44  
15 was marked for identification.)

16 Q I want to show you what has been marked as  
17 Exhibit 44. This purports to be a deed that is dated  
18 April 20th of 1973. It looks like it's recorded on  
19 April 23, 1973 in Warren County Courthouse. This is  
20 the deed from Marion Kinkead to Fisher & Young. For  
21 purposes and just maybe for the record, this has been  
22 previously been referred to as the deed, so you  
23 understand what that is.

24 Did you ever see that document or obtain  
25 that document and see that document as part of your

1 investigation that was conducted on behalf of  
2 Mr. Carlisle?

3 A I don't recall.

4 Q Again, if you had obtained that document as  
5 part of your investigation, would you have retained  
6 that document as part of your file?

7 A I would have certainly intended to.

8 (Thereupon, Hare Deposition Exhibit No. 45  
9 was marked for identification.)

10 Q And lastly, with regards to these  
11 documents, I'll show you Exhibit 45, which is a little  
12 out of order, which purports to be the deed between  
13 Fisher & Young and Mr. Carlisle. And this deed is  
14 dated January 19, 1970 -- excuse me. It's dated  
15 January 9, 1970. I think that you did in fact make  
16 reference at some point in your prior testimony that  
17 you had seen the deed as well as the article of  
18 agreement. And I could be wrong about that. I don't  
19 mean to suggest that's the deed.

20 Nonetheless, take a look at that document  
21 and tell us whether or not you had seen that document?

22 A My pre-trial narrative in the federal  
23 action lists, as one of my exhibits, a deed dated  
24 January 9, 1970. I believe that is the same deed that  
25 you have marked as Exhibit 45.

1 Q So there's a difference with regards to  
2 Exhibit 45 as it relates to the others. That is a  
3 document you did have; is that correct?

4 A It was one of the documents that  
5 Bert Carlisle gave to me together with the agreement  
6 of sale.

7 Q Okay. Now, with regards to, I think you  
8 previously indicated that on one more occasion you had  
9 made a request for documents from Matson; is that  
10 correct -- that related to timber rights?

11 A In discovery?

12 Q Yes.

13 A Yes.

14 (Thereupon, Hare Deposition Exhibit No. 46  
15 was marked for identification.)

16 Q Let me show you what had been marked  
17 Exhibit 46. And to expedite things, take a look at  
18 paragraph 4.

19 First of all, can you identify that as the  
20 request to Matson?

21 A This is plaintiff's first request for  
22 production of document. If you take a look at  
23 paragraph 4., it appears paragraph 4 is the portion of  
24 the request that would deal with deeds.

25 A You mean request No. 4?

1 Q Yes.

2 A I think.

3 Q I think that's the relevant paragraph. I  
4 think in paragraph 4 you make a request for such  
5 documents?

6 A We certainly do. We request all  
7 documents. And naturally, there is a definition of  
8 documents that is broad and comprehensive. "All  
9 documents reflecting or relating in any way to any  
10 transaction whereby you purport to have acquired  
11 rights to harvest timber in the Clough Farm."

12 (Thereupon, Hare Deposition Exhibit No. 47  
13 was marked for identification.)

14 Q Okay. I want to show you what has been  
15 marked as Exhibit 47 and show you what purports to be  
16 a response of June 15, '95. If you want to take a  
17 look at that, that is the response you received from  
18 Mr. Fossee to the request for documents?

19 A Well, his response that you have marked as  
20 Exhibit 47 doesn't specify that it's in response to  
21 the first request for production of documents. And he  
22 doesn't retype the requests themselves, so I can't be  
23 certain about that.

24 Q Looking at paragraph 4. I think  
25 paragraph 4 of Mr. Fossee's response is responsive to

1 paragraph 4 of your response.

2 A Looking at the dates on the certificate of  
3 service, this is probably in response to our first  
4 request for production of documents.

5 Q You have the document in front of you.

6 What is Mr. Fossee's response if you recall?

7 A His response, the deed and agreement, by  
8 which I trust he means the 1969 agreement of sale and  
9 the 1970 deed. "The deed and agreement are attached  
10 to the complaint."

11 "Merger documents," that relates to  
12 merger -- the inter-corporate merger, if you will,  
13 between Matson Lumber and Matson Hardwoods. "Merger  
14 documents are available at defendants's offices in  
15 Brookville, and may be viewed there during regular  
16 business hours with appropriate notice." And  
17 naturally, we got those subsequently.

18 Q Did you go to Brookville?

19 A No. As I recall, I asked him to provide  
20 those to me and he did.

21 Q The merger documents?

22 A That's right.

23 Q And as part of your request, I mean, at  
24 this point in time, when you were requesting these  
25 documents from Matson, was it your understanding that

1 they would have had the Fisher & Young documents?

2 A I don't know either way. Obviously, one of  
3 the objectives in discovery is to cast a wide net and  
4 get anything that might be useful.

5 Q Sure. Did you ever specifically request  
6 from Matson that they produce the document or  
7 documents which we have previously identified as the  
8 source document for the timber rights?

9 A I don't know what you mean by source  
10 documents.

11 Q Source document. Have you ever heard the  
12 term used by title searchers as a source documents for  
13 under which parties reach an agreement?

14 A I have never heard that particular jargon.

15 Q Okay. Let me see if I can rephrase it  
16 then.

17 Did you ever make a specific request to  
18 Matson for them to produce, specifically, the document  
19 or documents which they had from Fisher & Young which  
20 represented the conveyance of the timber rights on the  
21 Clough Farm to Fisher & Young?

22 A Yes.

23 Q Okay.

24 A Request No. 4.

25 Q Request No. 4?

1           A       And there may be others, but request No. 4  
2 is illustrative of that request.

3           Q       In the response -- you read the response,  
4 and you just read it into the record. In that  
5 response, do they -- in that response, do they respond  
6 that they have that document?

7           A       They responded that the deed and the  
8 agreement are attached to the complaint. The deed and  
9 the agreement were in my possession.

10          Q       And when you read that response, did you  
11 think that the deed and the agreement were the  
12 documents that had conveyed timber rights to Fisher &  
13 Young?

14          A       I thought that what he was doing was  
15 responding to my request for documents relating in any  
16 way to any transaction whereby they purport to have  
17 acquired rights. The transaction between Fisher  
18 & Young and Bert Carlisle memorializing the agreement  
19 of sale of 1969 retaining to Fisher & Young timber  
20 rights.

21          Q       I understand.

22          A       Matson is the successor-in-interest to  
23 those rights. I perceived this to be responsive to my  
24 request.

25          Q       Knowing that, you understood, did you not,

1 when you were looking at the deed documents and the  
2 agreement between Mr. Carlisle and Fisher & Young,  
3 that that document didn't convey from the owner of the  
4 timber rights, timber rights to Fisher & Young, did  
5 you not?

6 A Which owner?

7 Q Who was the owner prior to Fisher & Young?

8 A Marion Kinkead.

9 Q And that -- did you ever see any document  
10 or ask for any document that conveyed Marion Kinkead's  
11 timber rights to Fisher & Young?

12 A I think my document request No. 4  
13 encompasses that.

14 Q You had asked them for those documents;  
15 that is, you asked for the documents from Matson's  
16 counsel and they gave you the response and they never  
17 provided any document, agreement or deed that conveyed  
18 the timber rights from Marion Kinkead to Fisher &  
19 Young; is that correct?

20 A Not that I'm aware of.

21 Q If I understand it correctly, you never  
22 obtained that from any other source; is that correct?

23 A Not that I recall.

24 Q Did you know who represented Marion Kinkead  
25 in any transaction between Marion Kinkead and Fisher &

1 Young when Marion Kinkead conveyed those timber  
2 rights?

3 A I have no idea. I don't know if I ever  
4 knew that.

5 Q If I understand correctly, that wasn't part  
6 of your investigation; is that correct?

7 A Not that I recall.

8 Q With regard to -- did you ever advise  
9 Mr. Carlisle at any time prior to your representation,  
10 at any time that you were representing him in June of  
11 '98, that you had never seen the document or documents  
12 that had conveyed timber rights from the owner of the  
13 timber on the farm to Fisher & Young?

14 A I don't recall having a conversation to  
15 that effect. I don't know whether --

16 Q Was there any reason why you did not  
17 disclose that to Mr. Carlisle?

18 A That was not an issue presented. If you  
19 are asking why did I withhold that information, the  
20 answer is, I did not withhold that information.

21 Q If I understand it correctly, you have  
22 indicated you didn't have those documents; is that  
23 correct?

24 A As far as I recall.

25 Q And I'm asking why you didn't say to

1 Mr. Carlisle, "Hey, I have never seen the document or  
2 documents that conveyed the timber right to Fisher &  
3 Young"?

4 A For the same reason I didn't tell him,  
5 "Bert, I have never seen the documents that conveyed  
6 the rights to Marion Kinkead from her successor-in-  
7 interest or that owner's successor-in-interest going  
8 all the way back to 1066," that was not at issue.

9 Q Was it a relevant part of your  
10 investigation?

11 A That was not presented to me by the client.  
12 Q Do you think that the client would have had  
13 access to those documents?

14 A I have no idea. I know that the client was  
15 represented by a very fine attorney in 1969 and into  
16 the 1970s in connection with the purchase of this real  
17 estate.

18 Q And did you ever ask that attorney for  
19 those documents?

20 A I would assume, and would have assumed at  
21 the time, that any issues as to title with respect to  
22 Bert's ownership of that property were investigated  
23 and addressed by him and his counsel at the time. It  
24 was not an issue in my mind. It was not a question in  
25 my mind. It was not an issue that was presented by

1 I apologize.

2 Q That's all right. Let me ask you this,  
3 maybe this will close the subject, for this to be a  
4 transfer of timber rights from the owner of the timber  
5 right to Fisher & Young, it is your understanding that  
6 that would have to be in writing?

7 A I believe it would have to be in writing if  
8 it's a conveyance of standing timber. I think the  
9 statute of frauds would require a writing. Once it's  
10 cut and it's board lumber, I don't think it would need  
11 to be set forth in writing, absolutely.

12 Q Any other statutes that you are familiar  
13 with that would have referred to that?

14 A I don't recall. There may be, I don't  
15 know.

16 Q Was it your understanding that in the '94  
17 time period that any conveyance of timber rights to  
18 Fisher & Young in all probability would have required  
19 a written document?

20 A I believe it would. We talked about it  
21 before. It's referenced in the agreement of sale.

22 Q And you're saying that is the document that  
23 evidences the conveyance of timber to Fisher & Young?

24 A Presumably.

25 Q Okay. Let me then just keep on going for a

1           A        I don't recall the holding in that case  
2 today.

3           Q        Understood. In fairness to you, you asked  
4 if this came out of your file. It did not come out of  
5 your file but was cited in the case. Understood. I'm  
6 not trying to mislead you in any way.

7           A        Exhibit 48 is a copy of the opinion of a  
8 case that is cited in a case that was in my file?

9           Q        Yes.

10          A        Okay. I understand.

11          Q        I want to be absolutely correct and not try  
12 to mislead you, this document did not come out of your  
13 file.

14          A        Okay.

15          Q        The reason why I asked you whether or not  
16 you -- first of all, do you have a recollection of  
17 reviewing this case?

18          A        I couldn't tell you either way.

19          Q        Okay. Do you have -- do you have any  
20 recollection as to whether or not you did any research  
21 into the issue of whether or not the conveyance of  
22 timber in this particular case to Fisher & Young would  
23 be personalty or whether it would be considered  
24 realty?

25          A        I don't recall.

1 Q Did you have any knowledge as to the status  
2 of law in Pennsylvania as to how Pennsylvania treated  
3 those two issues?

4 MR. HABER: Treated what two issues?

5 MR. CONNER: Okay. Sorry.

6 BY MR. CONNER:

7 Q Specifically, does Pennsylvania distinguish  
8 between timber conveyance as realty as opposed to a  
9 timber conveyance that would be considered personality?

10 A At what time?

11 Q The time you were representing  
12 Mr. Carlisle.

13 A No. No. No. The Pennsylvania law on that  
14 issue as of what time?

15 Q As of '94, '98 time period?

16 A I doubt that I looked at that because he  
17 took title in 1969. So the state of the law in '98,  
18 I'm not sure, would have had any bearing on it.

19 Q Did you check in the 1969 time period?

20 A I don't recall.

21 Q Okay. Was it relevant to any of the issues  
22 that you were litigating for Mr. Carlisle whether  
23 Pennsylvania would consider the conveyance of timber  
24 to Fisher & Young as personality as opposed to realty?

25 A I don't believe that was relevant with

1 respect to any of the claims we asserted.

2 (Thereupon, Hare Deposition Exhibit No. 49  
3 was marked for identification.)

4 Q Thank you. I have some exhibits here that  
5 are stapled together if you will. And there may be  
6 documents you saw or may be documents you have not  
7 seen as part of your research. They are stapled  
8 together in one exhibit and they are identified as  
9 Exhibit 49.

10 Can you take a moment and look at that  
11 document. I'd like to ask you some questions about  
12 that if I may.

13 A Okay.

14 Q A couple of quick questions. Starting with  
15 the statute, Exhibit 49, the first statute we copied  
16 was 28 PS --

17 A 21 PS.

18 Q You are correct. 21 PS 521. And it talks  
19 about the sale of timber or bark by deed, it  
20 identifies in the title.

21 A That's what it says.

22 Q And were you familiar with that statute  
23 during the time period that you represented  
24 Mr. Carlisle?

25 A I can't recall.

1 Q And no recall of researching anything under  
2 that statute?

3 A I don't recall.

4 Q And then we can talk about 21 PS 522.

5 A My answer will be the same as to each of  
6 these sections of Title 21.

7 Q So to complete the subject, were you aware  
8 that there was a section in the statutes that dealt  
9 with deeds as it relates to conveyance of timber?

10 A I don't recall.

11 Q And with regards to the other statute  
12 section that are cited there, that's another statute  
13 section which I believe is, just for purposes of  
14 completeness, section 351 of Title 21.

15 You are not familiar with that document?

16 A As I say, the answer is the same as to all  
17 of these sections of Title 21. I don't recall.

18 Q Okay. And you don't recall looking at any  
19 of them and making any representations to  
20 Mr. Carlisle; is that correct?

21 A I don't recall.

22 (Thereupon, Hare Deposition Exhibit No. 50  
23 was marked for identification.)

24 Q I want to ask you some questions regarding  
25 your answer and new matter, Exhibit 50.

1 production of documents. This issue is an issue of  
2 contract interpretation with respect to the language  
3 in the 1969 agreement of sale. There's a provision in  
4 there accepting and reserving all timber and trees  
5 standing and falling. And it was that term that we  
6 assert to them, in the first instance, unambiguous and  
7 unambiguously providing that the only reservation was  
8 with respect to existing timber. We prevailed on that  
9 issue.

10 Q The parties to that agreement were only  
11 Fisher & Young and Mr. Carlisle?

12 A That is all the parties that there need to  
13 be to that agreement because that's the agreement  
14 under which we were litigating that issue.

15 Q Understood. But that -- as a consequence  
16 of that agreement only being between those parties,  
17 the owner of the timber that was conveyed to Fisher &  
18 Young was not a party to that agreement; is that  
19 correct?

20 A Sure. That's correct.

21 Q Okay. That's all the questions I have.

22 MR. CONNER: Okay. We will suspend under  
23 the circumstances previously mentioned.

24 MR. HABER: The questions about the intra-  
25 family dispute file?

HARE II

1

SCOTT HARE

- - - - -

1 IN THE UNITED STATES DISTRICT COURT  
2 OF THE WESTERN DISTRICT OF PENNSYLVANIA  
3 CIVIL DIVISION  
4  
5

6 ALBERT T. CARLISLE, )  
7 Plaintiff, )  
8 vs. ) CA No. 04-25 Erie  
9 BARTONY, HARE & EDSON; SCOTT )  
10 M. HARE, ESQUIRE; HENRY E. )  
11 BARTONY, JR., ESQUIRE; and )  
12 JOHN JOY EDSON, V., ESQUIRE, )  
13 Defendants. )  
14  
15  
16

17 REPRODUCTION OF THIS TRANSCRIPT IS PROHIBITED  
18 WITHOUT THE AUTHORIZATION OF THE CERTIFIED  
19 AGENCY.  
20  
21

22 DEPOSITION OF SCOTT HARE, VOLUME II  
23 Wednesday, March 15, 2006

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Plaintiff's Appendix  
000344

SCOTT HARE

- - - -

1 DEPOSITION OF SCOTT HARE, VOLUME II  
2  
3  
4 taken pursuant to the Federal Rules of Civil  
5 Procedure, before Judith Buckler, Court  
6 Reporter-Notary Public in and for the  
7 Commonwealth of Pennsylvania, on Wednesday, March  
8 15, 2006, at the offices of Weinheimer, Schadel  
9 and Haber, 602 Law & Finance Building, 429 Fourth  
10 Avenue, Pittsburgh, PA 15219, commencing at  
11 10:00 a.m.  
12  
13  
14  
15  
16  
17  
18  
19  
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21  
22  
23

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SCOTT HARE

- - - - -

1 A P P E A R A N C E S

2

3 On behalf of the Plaintiff:

4 Andrew J. Conner, Esquire

5 Conner Riley & Fryling

6 17th West Tenth Street

7 P.O. Box 860

8 Erie, PA 16512-0860

9

10 On behalf of the Defendants:

11 David L. Haber, Esquire

12 Weinheimer, Schadel & Haber

13 602 Law and Finance Building

14 429 Fourth Avenue

15 Pittsburgh, PA 15219

16

17 Also present:

18 None.

19

20

21

22

23

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SCOTT HARE

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1 I N D E X

2

3

4 WITNESS EXAMINATION BY PAGE

5 Mr. Hare Mr. Conner 5

6 Mr. Haber -

7

8

9 OBJECTION BY PAGE LINE

10 Mr. Haber 23 6

11 48 20

12 49 7

13 55 15

14 58 9

15

16

17 MARKED FOR

18 EXHIBIT NO. IDENTIFICATION

19 53 through 57 5

20

21 (Exhibits 56 and 57 were retained

22 by counsel for the Plaintiff.)

23

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SCOTT HARE

- - - - -

1 P R O C E E D I N G S

2 (10:05 o'clock a.m.)

3 SCOTT HARE,

4 the deponent, having been first duly sworn, was

5 deposed and testified as follows:

6 (Hare Deposition Exhibit Nos. 53,

7 54, 55, 56 and 57 were marked for

8 identification.)

9 EXAMINATION

10 BY MR. CONNER:

11 Q. Mr. Hare, we're continuing with your  
12 deposition which was taken last year, as you  
13 know. We have -- and maybe to expedite things a  
14 little bit we have marked some exhibits here that  
15 are to be exchanged between the parties, one of  
16 which was previously marked in the prior  
17 deposition. And I just want to run through these  
18 with you and then I want to come back and ask  
19 questions regarding...

20 Exhibit 53 is the Answer and New Matter --  
21 excuse me, Answer and Affirmative Defenses I  
22 believe that were filed on your behalf and your  
23 firm's behalf in these proceedings. Do you

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SCOTT HARE

- - - -

1 Q. Let me then just keeping on going for a  
2 second. I want to show you what's been marked as  
3 Exhibit 54. Ah, 54 was a document, a billing  
4 document which I believe is in February of 1999,  
5 that, if you can help me out a little bit, was  
6 marked in John Edson's deposition as Exhibit 6,  
7 but I don't think it was marked in the previous  
8 proceeding for -- not, ah, suggesting in any way  
9 that it was held back or anything at all, I'm  
10 saying it wasn't previously marked. Do you  
11 recognize this as a billing document that was  
12 prepared by you and sent out under your  
13 signature?

14 A. Well, Exhibit 54 is not signed. This  
15 appears to be an invoice prepared by the billing  
16 software that we use. I don't know whether there  
17 was a cover letter that went with it. So when  
18 you say under my signature I don't know if that's  
19 the case.

20 Q. Okay.

21 A. But Exhibit 54 does appear to be an invoice  
22 that our firm sent. I don't know whether I  
23 prepared it or my administrative assistant did

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SCOTT HARE

- - -

1 back in 1999.

2 Q. Who would have been your administrative  
3 assistant as of that time period?

4 A. I could only guess, and I don't want to  
5 guess.

6 Q. What were the choices? In other words, you  
7 had two or three? One, two or three?

8 A. Well, over a period of a number of years,  
9 yes. We had a very fine young lady named Jill  
10 Koval (phonetic) who worked for us, and it may  
11 have been at that period. I'm not sure. There  
12 was another gal, Carolyn Compstan (phonetic) I  
13 think was her name. I can't recall what years  
14 she worked for us.

15 Q. Okay.

16 A. That would be my best guess, that it's one  
17 of those two.

18 Q. Looking at the document itself it looks like  
19 it's dated -- tell us what date is on the  
20 document.

21 A. Well, this is an invoice that apparently was  
22 generated on February 7, 1999.

23 Q. And this is for the services that you

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SCOTT HARE

- - -

1 provided on 6/23/98?

2 A. Well, what this document -- invoices would  
3 be any open time entries or expense entries as of  
4 February 7th, 1999. Open meaning not previously  
5 billed.

6 Q. Okay.

7 A. You can see there is a previous balance  
8 reflected on this, something in excess of  
9 \$15,000. But the February 7th, 1999 invoice  
10 reflects a time entry of June 23rd, 1998. And  
11 that appears to be the only time entry that was  
12 billed in this invoice.

13 Q. Would that suggest then that that was the --  
14 that is the 6/23/98 was the, ah, the last time  
15 that you performed professional services on  
16 behalf of Mr. Carlisle between June 23 of '98 and  
17 February 7, 1999?

18 A. Not necessarily. It would suggest that  
19 that's the only time entry I billed for --

20 Q. Okay.

21 A. -- as of February 7th, 1999.

22 Q. With regards to the subject matter, or the  
23 work if you will that you billed for the time

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1 that you spent on 6/23/98, by looking at the  
2 document does this document describe what  
3 services you provided on behalf of Mr. Carlisle  
4 that you billed for, ah, for 6/23/98?

5 A. Yes, it provides a description.

6 Q. Of what it is that you did on June 23, '98,  
7 that you billed for on that particular day?

8 A. Are you asking me just to read the  
9 description of --

10 Q. Yes, and you can tell me what you did do.

11 A. Exhibit 54 indicates phone call with Peter  
12 Krembs; draft Praeclipe for Writ of Summons;  
13 letter to Lainard Bush.

14 Q. And let me expedite things. The Praeclipe  
15 for the Writ of Summons that we're talking about,  
16 that would have been the Praeclipe for Writ of  
17 Summons that would have been anticipated or  
18 expected to be filed in Warren County, is that  
19 correct?

20 A. I believe so.

21 Q. Yeah, because I think it has a Warren County  
22 reference on it. And this was the Writ of  
23 Summons that would be sent in with the letter to

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1       A.    Okay. I don't recall that, but that's fine.  
2       Um, and the effect if any of that dismissal under  
3       the Federal Rules with regard to tolling the  
4       statute of limitations for those actions, Mr.  
5       Krembs and his associate with whom I also spoke  
6       at or about that time had the view, as I recall,  
7       that the statute of limitations was not tolled,  
8       and that in fact the procedure of dismissing that  
9       -- those counts with the intent of refiling them  
10      in a subsequent state court action would not be  
11      successful. As I recall their view as they  
12      expressed it to me was that the statute will have  
13      run by the time the subsequent state court action  
14      is filed and gets underway.

15      Q.    Okay. Let me just make sure I understand  
16      what you're saying with regards to the statute of  
17      limitations, and what your conclusion was. Was  
18      it your understanding, at least at the time you  
19      had this discussion with Mr. Krembs, that Mr.  
20      Carlisle's refiled action in Warren County would  
21      be -- which included either Counts 5 or 7 or both  
22      would be considered timely filed to the extent  
23      that your Declaratory Judgement action was timely

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1 filed?

2 A. I don't understand if you're asking, is that  
3 my understanding or is it my understanding as to  
4 what Mr. Krembs believed?

5 Q. What your understanding is as opposed to Mr.  
6 Krembs, what Mr. Krembs believed?

7 MR. HABER: What his understanding was  
8 back in 1998?

9 MR. CONNER: Yeah.

10 Q. Right when you had this discussion with Mr.  
11 Krembs --

12 A. Sure.

13 Q. -- and you had a difference of opinion?

14 A. I'm not sure I follow your question, but let  
15 me try to give you an answer that may help. When  
16 we filed the stipulation of dismissal without  
17 prejudice in the Federal Court action of  
18 whichever counts were reflected in that  
19 stipulation, my view was that pursuant to the  
20 saving statute we could refile those counts in a  
21 subsequent state court proceeding provided we did  
22 so within the -- I think it's a one-year period  
23 of time. And that subsequent filing would be

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1       within the statutory period relating back to the  
2       date on which we filed the Complaint in Federal  
3       Court originally.

4           Mr. Krembs took a different view, and he  
5       expressed it to me in the summer of '98, in fact,  
6       I think during my very first conversation with  
7       him. I think you may have notes of that phone  
8       call that --

9       Q.     It was marked in a previous deposition.

10      A.     Mr. Krembs took the view that in fact there  
11       was not a tolling of the statute, and that any  
12       subsequent filing would not be timely with regard  
13       to any claims that arose earlier than two years  
14       before the date of that filing in the event of a  
15       two-year statute of limitations; likewise, four  
16       years prior with regard to any claim that is  
17       subject to a four-year statute. So the position  
18       Mr. Krembs took as Bert Carlisle's attorney in  
19       the summer of '98 was that the statute would have  
20       run by the time we filed the Praeclipe.

21       Q.     Okay. Now, let me just -- just one other  
22       follow-up question with regards to that. I think  
23       that you filed the declaratory judgement action

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1 on March 13 of 1995?

2 A. You're talking about the federal action?

3 Q. Right.

4 A. There was far more to that case than the the  
5 declaratory judgement claim, but certainly that  
6 was part of it.

7 Q. Well, the initial Complaint, irrespective of  
8 whatever you call it.

9 A. Okay.

10 Q. The initial Complaint was filed on March 13,  
11 1995. And if I understand it, and correct me if  
12 I'm wrong, was it your conclusion that as a  
13 consequence of your dismissal that you took for  
14 whatever counts we're talking about, either Count  
15 5 or Count 7, that you took pursuant to Rule 41  
16 of the Federal Rules of Civil Procedure, that as  
17 long as the refiled action was filed within a  
18 year of its dismissal, that those claims would be  
19 timely filed to the extent that the original  
20 Complaint was -- for declaratory relief was  
21 timely filed as of March 13, 1995?

22 A. Right, but the subsequent filing within the  
23 savings period would relate back to the date of

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1 the original filing of the first action.

2 Q. Yeah, meaning --

3 A. That's the view I had.

4 Q. Yeah, meaning if the statute of limitations  
5 for whatever claim we're talking about were two  
6 years and you filed your federal declaratory  
7 judgement complaint on March 13, 1995, it would  
8 go back to March 13, 1993?

9 A. Sure.

10 Q. Is that correct?

11 A. Using that example.

12 Q. Okay.

13 A. Right.

14 Q. Now, in addition to -- first of all, I know  
15 you mentioned Mr. Krembs, and we also have taken  
16 -- Mr. Haber has taken Mr. Krembs' deposition,  
17 and there was also a reference in the prior  
18 deposition that you were talking also to an  
19 associate, and so that I'm clear here, did you  
20 have -- when you were talking about you had this  
21 discussion with Mr. Krembs about the statute of  
22 limitations issues, is it your recollection you  
23 had that conversation with Mr. Krembs and/or his

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1 Q. Okay. Going back a second with regard to  
2 the statute of limitations, ah, discussions that  
3 you had with Peter Krembs wherein you indicated  
4 previously that it was your understanding that  
5 because of the manner in which you took the  
6 dismissal pursuant to Rule 41, and because of the  
7 saving statute the claims would be timely filed  
8 if they were refiled within a year of the  
9 dismissal that we previously discussed, did you  
10 make those statements, make those representations  
11 either in whole or in part to Mr. Carlisle also?

12 A. I'm sorry, that's a long question.

13 Q. Yeah, I'm just trying to ask whether or not  
14 you had this discussion with Mr. Krembs that  
15 we've just discussed, that about your view of the  
16 statute of limitations and about the propriety of  
17 your taking a Rule 41 dismissal and being refiled  
18 within a year of its dismissal --

19 A. Okay.

20 Q. -- saving the statute of limitations, ah, or  
21 protecting the claims against the statute of  
22 limitations defense. In addition to having this  
23 discussion with Mr. Krembs did you also have that

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1 discussion with Mr. Carlisle prior to your  
2 discussion with Mr. Krembs?

3 A. Oh, yes, far prior because I had that  
4 conversation with Mr. Carlisle before preparing,  
5 signing and filing the Rule 41 stipulation.

6 Q. Okay.

7 A. I had more discussions with Mr. Carlisle  
8 after Mr. Fossee signed the stipulation on behalf  
9 of defendants, and it was entered on the docket.

10 Q. So you had several discussions with Mr.  
11 Carlisle indicating that as long as it would be  
12 -- claim was refiled within a year of the  
13 dismissal, that that -- those claims would be  
14 considered timely filed under the Pennsylvania  
15 Law?

16 A. I don't know what you mean by several. I  
17 had more than one conversation with Bert  
18 Carlisle. I don't recall sitting here today if  
19 the refiling period is one year. If it is --  
20 that's what I seem to recall, but without the  
21 statute in front of me I wouldn't want to swear  
22 to that.

23 But the essence of your question, yes, I had

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1 more than one conversation with Bert initially  
2 before preparing and offering and filing the  
3 stipulation to get his authorization to do that.  
4 And again, after Mr. Fossee signed the  
5 stipulation and we filed it to report back to him  
6 that we had accomplished that.

7 Q. Okay. Um, so from the perspective of Mr.  
8 Carlisle's standpoint, ah, he could have had the  
9 understanding that by refiling within a year of  
10 the dismissal of -- pursuant to 41 of Count 5 and  
11 Count 7 which you took in December of '97, that  
12 these claims that were being refiled were being  
13 timely filed, is that correct?

14 A. I can't tell you what understanding he might  
15 have had from his perspective. I can tell you  
16 what I said to him, and I think we've go over  
17 that.

18 Q. Did you indicate to him either in whole or  
19 in part that there was a risk that they would not  
20 be considered timely filed; that is, Mr.  
21 Carlisle?

22 A. I don't recall saying anything --

23 Q. Okay.

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1 A. -- regarding that.

2 Q. How about with regards to the possibility  
3 that the refiled action would be subject to the  
4 defense of res judicata and collateral estoppel?

5 MR. HABER: Okay, I'm going to object  
6 to that. I think he's already answered that  
7 question.

8 MR. CONNER: I don't think...

9 A. You asked that question, and what I  
10 answered was I don't recall whether I had  
11 conversations with anyone regarding res judicata  
12 or collateral estoppel then or now or ever.

13 Q. Okay, fine. I think the prior question was  
14 in the context of Peter Krembs as opposed to Mr.  
15 Carlisle.

16 A. Yeah. And in answering that I said I never  
17 had those conversations with anyone.

18 Q. Let me go back just to the question -- oh,  
19 why would -- why, with regards to the refiled  
20 action why was the State Court chosen as opposed  
21 to the Federal Court, if you know?

22 A. As I recall, the sense was -- and I mean by  
23 that the collective sense of everyone involved in

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1 the case, the sense was that Warren County Court  
2 of Common Pleas would be a more favorable forum  
3 for Bert because it would impanel a Warren County  
4 jury, and the second action would concern  
5 specifically issues relating to property situated  
6 in Warren County. So I think just generally it  
7 was a strategic consideration.

8 Q. Was there an option in your mind that you  
9 could refile it in Federal Court, or don't you  
10 know?

11 A. No, I believe so. Certainly it would --  
12 there would be the same diversity jurisdiction  
13 underlying the first case. I forget whether at  
14 that point the minimum amount in controversy had  
15 been raised or whether it was still the old  
16 limit. But I think the claim, the allegation  
17 would have satisfied that figure.

18 And certainly with respect to Rule 41 of the  
19 Federal Rules, I think there was -- I think there  
20 would have been an option to file in Federal  
21 Court. But as I said, I believe everyone's  
22 collective impression or sense was that Warren  
23 County would be a more favorable forum for that

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1 action.

2 Q. Let me then go to the next exhibit. I think  
3 we have covered Exhibit 54. Let me talk to you  
4 about Exhibit 55. This is -- yes, let me show  
5 you what has been identified here as Exhibit 55.  
6 You might want to take a moment and take a look  
7 at this document. Ah, it's a three-page  
8 document. I think the face of the document is a  
9 document that's customarily used for faxing  
10 another document to a party or a person or a  
11 phone number. Ah, first of all, do you recognize  
12 the handwriting on the face page?

13 A. On the first of page of Exhibit 55, yes,  
14 that's my handwriting.

15 Q. That purports to be a date of May 28, 1998,  
16 correct?

17 A. That's right. And that date is confirmed in  
18 the fax banner at the top of the page.

19 Q. Okay.

20 A. I presume from that fax banner that this  
21 document came from Steve Madewell's file.

22 Q. Yeah. As I previously indicated off the  
23 record that I obtained copies of his file and

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1 March of 1998?

2 A. I don't recall the date, but yes, we  
3 mediated with Joe Torgrosa (phonetic) who runs  
4 the Third Circuit mediation program.

5 Q. And just by way of reference, I think we  
6 previously marked as an exhibit, and we can pick  
7 it out if necessary, that that was the mediation  
8 process that you had sent -- or made a five  
9 million -- additional five million dollar demand,  
10 was it not?

11 A. I don't recall the details of our demand,  
12 but we did make a demand at the mediation  
13 conference.

14 Q. And was this letter a response to that  
15 demand, their counter proposal?

16 A. I don't know, you'd have to ask Chet that.  
17 This is, as I understand it, Matson Lumber's  
18 proposal to us.

19 Q. Did you respond to this letter, if you  
20 recall?

21 A. I don't recall.

22 Q. Um, do you have a recollection as to what  
23 Mr. Carlisle's response was to this proposal?

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1 A. This was not acceptable to him.

2 Q. Why was this not acceptable to Mr. Carlisle?

3 A. Well, I'm not sure I know all the reasons,  
4 but as I recall he was not interested in allowing  
5 Matson any further cutting on the property. And  
6 he wanted more money from Matson, neither of  
7 which terms are embodied in this proposal.

8 Q. Ah, we're getting ahead of ourselves a  
9 little bit, because -- was it your understanding  
10 at least as of May of 1998 that Matson did have a  
11 right to reenter the property as of that time  
12 period to do further timbering?

13 A. Are you asking whether that's the -- whether  
14 that's the consequence of the verdict in the  
15 Federal Court action?

16 Q. Right.

17 A. The Federal Court verdict established the  
18 limits of Matson's harvest rights. It set  
19 boundaries both physical with respect to no cut  
20 zones, and temporal so-to-say, meaning that  
21 Matson would was only permitted to cut timber  
22 that was in existence -- the contract terminology  
23 I think was standing or fallen, but timber that

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1       was in existence as of the date of the  
2       conveyance.

3           Subject to those limitations, and there may  
4       have been others in the contract, seasonal  
5       limitations for example, yes, Matson had a  
6       continuing right to enter the property and remove  
7       timber to which it had title.

8       Q.    Was there any time limitation that Matson  
9       had after the jury verdict to reenter the  
10      property to continue its timbering operations of  
11      timber that was in existence after the date of  
12      the conveyance, as you said, of 1969?

13      A.    No, there is no time limit, no sunset  
14      provision if-you-will --

15      Q.    Right.

16      A.    -- in the original agreement, nor was there  
17      one as a result of the jury verdict. So in other  
18      words, so long as Matson stayed within the other  
19      limits imposed on it it could exercise its timber  
20      rights ad infinitum.

21           I mean, eventually obviously the trees will  
22      no longer exist, ah, the trees to which they have  
23      title because eventually trees will die. But

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1       subject to the limitations of nature, no, Matson  
2       was not limited in the period in which it could  
3       exercise its rights.

4       Q.     Was there any reason why you didn't ask the  
5       court or jury to impose a temporal or a time  
6       limitation as to when they could reenter the  
7       property to do further timbering operations?

8       A.     Yes.

9       Q.     What was the reason as to why you did not  
10      request either the court or jury to establish a  
11      time limitation as to when they could return to  
12      continue their timbering operations?

13      A.     Because there is no such limit in the  
14      agreement Bert bargained for and agreed to when  
15      he bought the property. If I had asked for that  
16      I would be asking the jury to rewrite the  
17      agreement and to add additional terms that  
18      weren't there. And that was expressly contrary  
19      to what we were trying to achieve in the Federal  
20      Court action, which was to enforce the parties'  
21      agreement.

22      Q.     Um, did you indicate to Mr. Carlisle either  
23      in whole or in part that as a consequence of the

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1 that.

2 Q. Did Mr. Fossee ever provide access or  
3 provide you access to any documents that  
4 suggested that Fisher and Young timber rights on  
5 the Clough farm expired as of April 1, 1978?

6 A. Not that I'm aware of.

7 Q. Would that have made a difference in your  
8 thinking as to how you would have processed the  
9 claim of Mr. Carlisle if Mr. Fossee had provided  
10 you with such a document?

11 MR. HABER: I'm not sure I understand  
12 the question. You're asking him to say how he  
13 would have litigated the case if he had been  
14 provided documents that may indicate that Fisher  
15 & Young's rights to the treaty that expired on  
16 April 1st, 1978 --

17 MR. CONNER: Let me see if I can  
18 rephrase the question and maybe --

19 MR. HABER: Well, I'm going to object  
20 to the question because I think you spent five  
21 hours at his previous deposition discussing how  
22 he's litigated the case.

23 Q. Was it relevant or not relevant to your

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1 thinking in deciding that Matson, I think you  
2 indicated was an invitee on the property; that  
3 is, on the Clough farm, ah, that there may be a  
4 document that indicated that Fisher and Young's  
5 timber rights expired as of April 1, 1978?

6 MR. HABER: I'll object to the  
7 question.

8 A. That's impossible to answer.

9 Q. Why is that impossible to answer?

10 A. Mr. Carlisle gave me a set of documents --

11 Q. Okay.

12 A. -- and asked me to advise him regarding his  
13 rights under those documents. I reviewed the  
14 documents, and contrary to the conclusion that  
15 other lawyers before me had reached, I told Bert  
16 I believed we had a cause of action on his  
17 behalf.

18 We litigated that cause of action; we won.

19 As a result of that he got declaratory relief.

20 As a result of that he got money damages in  
21 excess of the price he paid to purchase the  
22 property. And we vindicated his position under  
23 the agreement of sale he asked me to review.

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1 Now, as far as I can gather, you're asking  
2 me in the space of a question or two in a  
3 deposition to speculate what other kind of case I  
4 might have litigated under other sets of  
5 circumstances.

6 Q. I asked a --

7 A. Forgive me, and I'm sorry but I can't do  
8 that.

9 Q. Let me ask you the question, and if you  
10 can't answer it that's fine. Would it be  
11 relevant to your thinking in deciding whether or  
12 not Matson was an invitee or a trespasser, ah,  
13 that there were facts in the document that  
14 indicated that Matson's predecessor of interest  
15 and rights for that timber as --

16 A. Well --

17 Q. -- April 1, 1968. The question is, was it  
18 relevant or not relevant?

19 A. Well, I can't answer. I don't know. I don't  
20 know that there is such a document.

21 Q. In other words, you don't know that that  
22 document applies to the Clough farm that's in  
23 front of you, is that correct?

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1 A. To reiterate, I don't see anything in this  
2 document that identifies the Clough farm either  
3 by name or by meets and bounds, long description,  
4 short description or in any other fashion. Now,  
5 it could be that I'm overlooking it, and if you  
6 could point out to me something that would help  
7 orient me I'd be happy to look at it. I don't  
8 see anything to that effect.

9 Q. And maybe I'll just suggest, did you ever  
10 see any document that conveyed the timber rights  
11 to Fisher and Young, and if so why don't you tell  
12 us what the document was that you saw that  
13 conveyed timber rights from the owner of the  
14 timer to Fisher and Young?

15 MR. HABER: Andy, the purpose of the  
16 second part of the deposition was limited in  
17 scope. We're not going to go back and retestify  
18 as to everything that happened in the first part  
19 of the deposition.

20 MR. CONNER: Well, this is a follow up  
21 to that -- to his response.

22 MR. HABER: I mean, the purpose of  
23 this deposition was to discuss the documents we

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1 produced relative to the family matter, and I've  
2 given you a lot of leeway. But that was three  
3 hours' worth of testimony at the prior  
4 deposition. What documents didn't he have, what  
5 documents did he have.

6 MR. CONNER: Well....

7 MR. HABER: If you can answer go  
8 ahead, but I'm not going to let you retestify as  
9 to the whole prior deposition.

10 A. And the only way I could answer that  
11 question is by exhumeing all those exhibits we  
12 looked at before and reviewing all of the deed  
13 documents and other agreements that Bert Carlisle  
14 provided to me. And to do that we would be  
15 reiterating day one of my deposition.

16 Q. Well, let me ask you a real narrow question.  
17 Do you have a recollection of seeing a document  
18 that conveyed timber rights from Mrs. Kinkead to  
19 Fisher and Young? That's yes or no, or I don't  
20 recall, whatever choice you want to make is fine.  
21 It doesn't bother me.

22 A. As I recall there was -- the estate in the  
23 land was partitioned. At some point there was a

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1 conveyance of the real property separate and  
2 apart from the timber. And I would have to go  
3 back to all those documents to recollect when and  
4 where that happened and between which parties,  
5 because then there were subsequent conveyances of  
6 both the land and the timber thereafter.

7 Q. Let me go back to --

8 A. That's the best I can recall.

9 Q. Do you have a recollection of seeing a  
10 document that conveyed timber rights by Mrs.  
11 Kinkead to Fisher and Young in representing Mr.  
12 Carlisle?

13 A. That's the best that I can recall --

14 Q. Yes or no?

15 A. -- what I just described.

16 Q. Yes or no?

17 A. The best that I can recall is that if we  
18 looked through those several documents that  
19 embody the various conveyances, that's where we  
20 would find that.

21 Q. And they would be conveyances between  
22 Kinkead and Fisher and Young?

23 A. Between a number of parties, because these

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Plaintiff's Appendix  
000373

SCOTT HARE

- - - -

1 rights passed through the hands of a number of  
2 parties.

3 MR. HABER: He needs to change the  
4 tape.

5 (Discussion off the record.)

6 BY MR. CONNER:

7 Q. Just to conclude that subject, you're not  
8 able to identify today the document -- any  
9 document that conveyed -- that represented a  
10 conveyance of timber by Mrs. Kinkead to Fisher  
11 and Young, is that correct?

12 A. Not from memory, I'd have to go through the  
13 documents.

14 Q. Okay. Um, but you believe such a document  
15 exists; that is, that you in fact saw a document  
16 that conveyed Kinkead timber rights to Fisher and  
17 Young?

18 A. I think we've covered that. I think the  
19 answer to that is yes.

20 Q. Okay. Ah, and that was -- you saw that as  
21 part -- during the time you represented Mr.  
22 Carlisle as opposed to subsequent, is that  
23 correct? I mean, the time period '94 to '98, is

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1 that correct?

2 A. The very best of my recollection, yes.

3 Q. Okay. Let's then go to -- I want to ask you  
4 some questions regarding the affirmative defense  
5 that's been asserted on your behalf. You've seen  
6 that have you not? I just want to run through  
7 those if you will and ask you some questions.

8 With regard to the first offense, I believe it's  
9 the statute of limitations defense, is that not?

10 A. That's what it says.

11 Q. Okay. And can you tell us what facts and  
12 information you have that you're prepared to  
13 testify to that would support the statute of  
14 limitations defense?

15 MR. HABER: Again, I'm going to put  
16 the same objection on I had before. You're  
17 asking for attorney/client privilege  
18 conversations, because for him to -- he has a lot  
19 of facts, but for him to relate the facts to the  
20 defense of the statute of limitations is based on  
21 conversations I had with Mr. Hare. That is how  
22 he relates the facts to the statute of  
23 limitations defense. You can ask him about

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1       facts, but once you ask him to relate it to the  
2       statute of limitations, now you're asking for  
3       attorney/client privilege.

4                    MR. CONNER: Well, let me --

5                    MR. HABER: Can you understand my  
6       objection?

7                    MR. CONNER: Well, I -- you have --

8                    MR. HABER: I mean, he has had a lot  
9       of conversations. He knows about the date the  
10      lawsuit was filed, that's easy, that's a fact.  
11      But how that impacts on the statute of  
12      limitations, I mean...

13     BY MR. CONNER:

14     Q.    Let me see if I can expedite this a little  
15    bit. If I understand it correctly, it was --  
16    your indication to Mr. Carlisle that he could  
17    refile the second action in Warren County --  
18    you've already testified to that, is that  
19    correct?

20     A.    Did I indicate that to Bert Carlisle, yes, I  
21    did.

22     Q.    How long could he rely on your  
23    representations that he could process the second

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1 action?

2 A. I don't understand your question.

3 Q. In other words, you indicated on June 23  
4 that he could file the -- at least file the  
5 second action. Was there a time period after  
6 that that he could no longer rely on your  
7 representations that he could process that claim,  
8 if you know?

9 A. I don't know -- I don't know what you're  
10 asking me when you say rely on my  
11 representations. How long he had to refile I  
12 believe we talked about earlier this morning.

13 Q. Right.

14 A. And --

15 Q. -- was timely filed?

16 A. I believe you confirmed my recollection that  
17 the saving statute allows for refiling within one  
18 year.

19 Q. Okay.

20 A. So he could -- by our recognizing at the time  
21 he could refile within one year.

22 Q. Okay.

23 A. I don't understand what you mean when you

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1 issue as to which we obtained an absolute  
2 victory.

3 Q. Was one of Carlisle's goals to seek an  
4 exclusion of Matson from this property after the  
5 jury verdict?

6 A. Pardon me?

7 Q. Was one of Carlisle's goals -- ah, was to  
8 seek an exclusion of Matson from the property?

9 A. Are you asking did he have the objective in  
10 the Federal Court action of having Matson barred  
11 completely from the property?

12 Q. Was that one of his goals?

13 A. That's not an issue we litigated, nor is  
14 that an issue that's consistent with the  
15 agreement of sale. Whether he harbored that goal  
16 in his mind I can't say.

17 Q. Was that --

18 A. Excuse me. Had he said to me, let's try to  
19 get Matson barred from the property beginning  
20 immediately and lasting forever, which he did not  
21 say incidentally to my recollection, I would have  
22 said to him, your agreement doesn't provide for  
23 that.

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1 Q. And the agreement you're talking about is  
2 the agreement that he had with Fisher and Young,  
3 and those were attached to the Complaint, I  
4 believe, is that correct?

5 A. Yeah, the agreement by which he purchased  
6 the land.

7 Q. Um, let me touch on one last subject. You  
8 indicated that in follow up to the affirmative  
9 defense that the goals were achieved in the  
10 declaratory judgement action, that Carlisle was  
11 pleased with the verdict and the results after  
12 this time period, ah, and I'm talking about the  
13 December of 1997 time period. Ah, and just as a  
14 completion of that thought was there any time  
15 between the time of the verdict in December of  
16 '97 and June of '98 when your firm separated as  
17 acting as counsel for him that Carlisle ever  
18 indicated to you -- where you ever became aware  
19 that Mr. Carlisle was dissatisfied with the  
20 December of '97 verdict?

21 A. Not that I recall.

22 Q. Okay. You don't have any recollection  
23 during the time of your representation, at least

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1 up until June of 1998 -- June 23, 1998, that Mr.  
2 Carlisle -- having a sense that Mr. Carlisle was  
3 dissatisfied with the December of 1997 verdict?  
4 A. No. As far as I can recall, all indications  
5 were to the contrary. I think I talked to him  
6 the first day about his embrace, he hugged me  
7 after the jury verdict was read. And he may have  
8 been tearing up in his eyes as I recall. But I  
9 don't recall any manifestation that he was  
10 displeased with the verdict.

11 Q. And in --

12 A. He was displeased that Matson took an  
13 appeal, which of course was unsuccessful for  
14 Matson. The Third Circuit affirmed our verdict  
15 in all respects.

16 Q. And in talking to either Mr. Bush, Lainard  
17 Bush or Jim Aul or Mr. Madewell, the fellow's  
18 name that's on the previous exhibit, at any time  
19 between the time of the verdict in December of  
20 '97 all the way up through June of '98, had they  
21 ever expressed to you in your presence that they  
22 were -- and/or that Bert was -- or all of them  
23 were dissatisfied with the December of 1997

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1           verdict?

2           A. Not that I recall. Once again, I think  
3           everyone was frustrated by the fact that Matson  
4           had taken an appeal. Obviously Bert wanted his  
5           money and wasn't getting his money while the case  
6           was on appeal. If I recall, Matson filed his  
7           supersedeas bond, so Bert was not happy that he  
8           wasn't being paid the verdict. But I don't  
9           recall anyone indicating that they were  
10           dissatisfied with the verdict or the terms of  
11           verdict itself.

12                    MR. CONNER: Okay. That's all the  
13                    questions I have.

14                    (Witness excused.)

15                    (Signature waived.)

16                    (Deposition concluded at 11:20 a.m.)

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1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE WESTERN DISTRICT OF PENNSYLVANIA

3 - - -  
4 ALBERT T. CARLISLE, )  
5 Plaintiff, )  
6 vs. ) 04-25 ERIE  
7 BARTONY, HARE & EDSON; SCOTT M. )  
8 HARE, ESQUIRE; HENRY E. BARTONY, )  
9 JR., ESQUIRE; and JOHN JOY V. )  
10 EDSON, ESQUIRE, )  
11 Defendant. )  
12 - - -

13 Deposition of JOHN S. KOOKOGEY, ESQUIRE

14 Tuesday, August 16, 2005

15 - - -  
16 The video deposition of JOHN S. KOOKOGEY,  
17 ESQUIRE, called as a witness by the Plaintiff,  
18 pursuant to Notice and the Federal Rules of Civil  
19 Procedure pertaining to the taking of depositions,  
20 taken before me, the undersigned, Deborah L. Endler, a  
21 Notary Public in and for the Commonwealth of  
22 Pennsylvania, at the offices of Culbertson, Weiss,  
23 Sertoma & Schug, 228 East Central Avenue, Titusville,  
24 Pennsylvania, commencing at 10:02 o'clock a.m., the  
25 day and date above set forth.

26 - - -  
27 COMPUTER-AIDED TRANSCRIPTION BY  
28 MORSE, GANTVERG & HODGE, INC.  
29 PITTSBURGH, PENNSYLVANIA  
30 412-281-0189

31 - - -  
32  
33 - - -  
34  
35

1 APPEARANCES:

2 On behalf of the Plaintiff:

3 Conner Riley & Fryling:  
4 James R. Fryling, Esquire  
Andrew J. Conner, Esquire  
17 West Tenth Street  
5 P.O. Box 860  
Erie, Pennsylvania 16512

6 On behalf of the Defendant:

7 Weinheimer Schadel & Haber:  
8 David L. Haber, Esquire  
602 Law & Finance Building  
9 Pittsburgh, Pennsylvania 15219

10 - - -

11 ALSO PRESENT: Herm Stork, Videographer

12

13

14 INDEX

15 EXAMINATION BY:	PAGE:
16 Mr. Fryling	3
16 Mr. Haber	215

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1                   VIDEOGRAPHER: It's August 16th, 2005,  
2                   10:02 a.m. Would each attorney present please  
3                   give their name and who they represent?

4                   MR. FRYLING: My name is Attorney James  
5                   Fryling, I represent Albert T. Carlisle, the  
6                   Plaintiff.

7                   MR. HABER: I'm David Haber, I represent  
8                   the Defendants.

9                   VIDEOGRAPHER: Would the court reporter  
10                  please state her name and swear the witness?

11                  REPORTER: Deborah Endler.

12                  JOHN S. KOOKOGEY, ESQUIRE  
13                  called as a witness by the Defendant, having been  
14                  first duly sworn, as hereinafter certified, was  
15                  deposed and said as follows:

16                  EXAMINATION

17    BY MR. FRYLING:

18    Q        Thank you. Mr. Kookogey, good morning.

19    A        Good morning.

20    Q        My name is James Fryling and along with my  
21    partner Andy Conner, we represent Albert Carlisle in a  
22    case that's been brought in the United States District  
23    Court for the Western District of Pennsylvania. We  
24    have asked you to come here today by virtue of a  
25    notice of videotaped deposition and I understand that

1 you were, received a copy of that?

2 A Yes, yes.

3 Q I'm going to go ahead just for the record

4 have that marked as Exhibit No. 1.

5 (THEREUPON, Deposition Exhibit No. 1 was

6 marked for identification.)

7 Q Thank you. Along with the notice of  
8 videotaped deposition, there was a request under Rule  
9 45 of the Federal Rules of Civil Procedure for  
10 production of documents, correct?

11 A Yes.

12 Q All right. And I'm wondering if you had an  
13 opportunity to review any documents in this case and  
14 bring any documents with you for today's deposition?

15 A Very limited --

16 Q Okay.

17 A -- in that regard. I don't know whether  
18 you would like me to explain or not why.

19 Q Absolutely.

20 A I had a law office here in Titusville for  
21 many years and I sold it to a successor, Kemp Scales  
22 who is an elder law attorney and that's what he is  
23 certified as such. And he has gotten rid of all the  
24 files in the old office except for a couple of  
25 miscellaneous little things I doubted would have any

1 bearing on what you are doing here.

2                   But in any event I brought a couple of  
3 things along. But the vast amount of all of our files  
4 on Fisher & young and their successors and the title  
5 to the property that's in question I guess in Warrant  
6 County, they are all, been disposed of. So I don't  
7 have anything actually.

8                   Like you asked for title certificates that  
9 I might have, opinions that I might have given. And I  
10 did give, but I never represented Carlisle in any of  
11 this. So I don't know if I have anything that would  
12 be helpful to you. I did represent Fisher & Young. I  
13 did not represent the successors in that chain of  
14 title. I had no connection with them at all.

15           Q        Okay.

16           A        So just Fisher & Young, the original  
17 landowner of the Clough farm.

18           Q        Now, you indicated that you did bring some  
19 documents with you. If you could identify for those  
20 us, please?

21           A        Yeah, I have a title company certificate  
22 that was, attorneys preliminary certificate of title  
23 to, in favor of Albert Carlisle dated back in, well,  
24 it's not executed. It's not dated, but it's around,  
25 it's referring to this property I should say. And

1 and I'm fully retired.

2 Q All right. And you retired in 2002?

3 A 2001.

4 Q 2001?

5 A Yeah. Not long after the big hullabaloo in  
6 New York City from the terrorists which I think was  
7 2001, 9/11/2001.

8 Q And in preparing for your deposition today  
9 am I correct that you had an opportunity to go back to  
10 your former office --

11 A Yes.

12 Q -- and look for some documents?

13 A That's correct.

14 Q Did you talk to anybody about the  
15 deposition to prepare for it?

16 A No, I have not.

17 Q So you haven't talked to Attorney Dennison?

18 A No. Oh, I know him, though, he represents  
19 Matson from Brookville, yeah. That's who you are  
20 talking about?

21 Q Correct.

22 A No, I have not. I have not been talking to  
23 him about anything.

24 Q How about Attorney Fossi?

25 A No, I hadn't talked to him or anybody.

1 just sort of inherited that job as a result of my  
2 coming into Mr. Jack's office working for him.

3 Q And did you do all manner of corporate work  
4 for Fisher & Young or --

5 A No.

6 Q -- was your role limited to real estate?

7 A Limited to real estate.

8 Q Okay. And what types of real estate things  
9 did you do for Fisher & Young?

10 A Well, they were a lumber company and so  
11 they were interested in timber and land with timber,  
12 trees on it, potential timber assets. And that was  
13 the type of, and agreements of sale and deeds and  
14 mortgages in connection with the sale or purchase of  
15 those items, timbering items.

16 Q And did you know the principals of Fisher &  
17 Young?

18 A Yes, the president you mean and Phillip  
19 Cochran was. I knew Mr. Young who was the originator  
20 of the corporation. Mr. Jack as I mentioned was my  
21 predecessor, incorporated Fisher & Young. And I knew,  
22 they were all Titusville people.

23 Q So you had a professional and a social  
24 relationship with the Cochran's?

25 A I don't think I'd call it a social

1 Yeah, this is a letter from Pete Eaton to me, Attorney  
2 Pete Eaton. Let's see, this is yeah, I see that, I  
3 don't know what you want me to do in identification,  
4 give you the date and who it's from and to whom it was  
5 written?

6 Q If you would, please.

7 A This is a letter to me as an attorney.  
8 Doesn't say for whom, but obviously I think I must  
9 have been for Fisher & Young, dated November 27, 1967,  
10 in which he was introducing me in a sense to the  
11 transaction between Fisher & Young and the Kinkeads  
12 for the sale of the Clough farm.

13 The Clough farm included a lot more than  
14 just one parcel. It was an assembly of a whole lot of  
15 parcels that made up probably 1,500 acres all  
16 together. So actually where Clough lived on the farm  
17 was only a small part of the total farm that's  
18 identified as his farm. But in any event, this is a  
19 letter introducing me to the project, as he called it,  
20 of the up and coming sale in 1967 from Fisher & Young  
21 to Carlisle.

22 Q Okay. And as I read the letter, it seems  
23 that Attorney Eaton is representing Mrs. Kinkead --

24 A Right.

25 Q -- in the sale of this Clough farm to

1 Fisher & Young and he is enclosing to you a number of  
2 items --

3 A Yes.

4 Q -- for your review. Does that, I read that  
5 letter, it seems to indicate that you are going to be  
6 representing Fisher & Young in this transaction?

7 A That's what appears that way to me. Now,  
8 I've forgotten that, but I knew Mr. Eaton well and I  
9 had been connected with the Fisher & Young on other  
10 transactions and I assume that that must be the case,  
11 that I had been representing them.

12 Q Okay.

13 A I did not represent Carlisle, of course.

14 Q Correct. Now, I don't know if these two  
15 documents are connected or not, but they were somehow  
16 attached to this letter, even though they don't appear  
17 to be enclosed. Before I mark them, I'm just going  
18 to, they are not even very good copies, but if you  
19 could identify those?

20 A I cannot. I don't know what the heck road  
21 is what here, but I can see that obvious roads on  
22 here. I'm familiar, I've been to this farm, I know  
23 what it looks like or at least parts of it, where the  
24 buildings were.

25 What Carlisle bought is the surface rights,

1 of course and the mineral rights. But it's largely a  
2 wooded area, but there are a few tracks which I can  
3 identify I think from this poor copy of a map. These  
4 cleared areas are close to the buildings.

5 One thing that was unique about the farm  
6 were two huge barns with two very huge silos and they  
7 are right along the road. And I don't know, I would  
8 guess that that would be on one of these cleared areas  
9 in this general area here that I'm pointing to on the  
10 east. I don't know, I think, I'm not sure, but I  
11 think maybe this is north at the top of this sheet.

12 Q Okay.

13 MR. FRYLING: Why don't we go ahead and  
14 mark this as Exhibit No. 3.

15 (THEREUPON, Deposition Exhibit No. 3 was  
16 marked for identification.)

17 Q Does that appear to be some type of aerial  
18 map of --

19 A Yes, it does.

20 Q -- the Clough farm?

21 A Yes, it does.

22 Q I'm going to show you what I've marked as  
23 Exhibit 4.

24 (THEREUPON, Deposition Exhibit No. 4 was  
25 marked for identification.)

1 Q Okay.

2 A His name was William Nagy, N-a-g-y, at the  
3 time. Let's see what else we got here. Exhibit 8,  
4 well, Exhibit 8 is the same as Exhibit 6 I think,  
5 yeah. Except there is no pencil notations on Exhibit  
6 8 as there are on Exhibit 6.

7 Q Okay. And the pencil notations that are on  
8 Exhibit 6, do you recognize that handwriting?

9 A No, I don't. I don't have any idea whose  
10 that would be. It is not mine.

11 Q Okay.

12 A I know that.

13 Q And the penciled notations on the bottom of  
14 that indicate land, looks like 2,782?

15 A Right.

16 Q Buildings 22,218?

17 A Yes.

18 Q Timber 100,000?

19 A Yes.

20 Q For a total of 125,000, is that correct?

21 A That's right.

22 Q Okay.

23 A Now, that probably was done, if we can  
24 indulge in my speculation, you know, the transfer tax  
25 is on the land and not on the timber and if the timber

1 is expected to be cut within a reasonable time, and so  
2 it was common practice to separate the value of the  
3 timber from the value of the land and buildings and  
4 you would pay the Pennsylvania transfer tax on the  
5 land and buildings and not pay any on the, and that  
6 was an acceptable procedure, never questioned by the  
7 Department of Revenue of Pennsylvania. And that looks  
8 like that's why somebody is allocating the total among  
9 those.

10 Q Okay.

11 A Let's see, now, 9, looks like the same as  
12 7-- I don't know. There is not, the totals of the  
13 acres of certain species and sizes does not add up to  
14 the, quite to the total on Exhibit 7. But otherwise  
15 you got the same species and same sizes are allocated  
16 among species between, and the two Exhibits 7 and 9  
17 are alike in that regard but the numbers have been  
18 changed slightly.

19 Q Okay.

20 A Now, let me see, Exhibit 10, this is a  
21 management cost summary, attorneys fees, realty  
22 transfer tax. Incidentally, the realty transfer tax  
23 was commonly divided between the buyer and the seller  
24 and that was I see the half of the Pennsylvania realty  
25 transfer tax in this case was going to be \$650 which

1 21, 5, 12 acre pieces that are not part of the main  
2 part of the farm apparently, odd pieces that they  
3 have --

4 Q Okay.

5 A -- as a part of their ownership, though.

6 Q And again, do you know whether or not those  
7 documents relate specifically to the Clough farm or  
8 not?

9 A No, I have no way of knowing that.

10 Q Okay.

11 A Actually.

12 Q If you were representing Fisher & Young in  
13 the purchase of either land or timber, would you need  
14 documents like that or that type of information in  
15 order to proceed with the deal?

16 A Well, our main concern I suppose initially  
17 other than the final price that was being paid by  
18 Fisher & Young to Mrs. Kinkead, would have been to  
19 settle on how we are going to agree on what transfer  
20 tax were to be paid. In other words, how much of this  
21 is forested land and how much is vacant land or  
22 pasture land or fields or whatever. And so I would  
23 assume that from what I see in these exhibits that  
24 this is the result of some prior discussion that might  
25 have taken place in that regard.

1 brought, first of all, I would have brought it down to  
2 the current date. This is something they would have  
3 obviously done prior to that sale. And there was a  
4 problem, that I considered at least to be a problem at  
5 the time, that the Kinkeads, Mrs. Kinkead was a  
6 Clough, her maiden name was Clough. And she had a  
7 couple of brothers and they all apparently let the  
8 title descend to her, but they did it by what was more  
9 a common practice in those days by letting it go to  
10 taxes and getting a tax deed from the county for the  
11 farm. And that was my main question concerning the  
12 title to the property.

13                   But Mr. Blackman and also Mr. Eaton, both  
14 of whom were old and seasoned veterans so to speak in  
15 the Bar Association in Warren County, had assured us  
16 that in spite of the tax title, that this property  
17 had, the sale had taken place sufficiently long enough  
18 ago that they wouldn't be concerned about it and  
19 neither would the Bar Association of Warren County be  
20 concerned about it at all.

21                   Q       All right.

22                   A       But there was that little thing that I can  
23 remember inquiring about to them and feeling assured  
24 that it would pass muster in Warren County.

25                   Q       All right. And the purpose then of you

1 was well acquainted with the principals and so on and  
2 so forth. He might have done that and just asked to  
3 help with this title business.

4 Q So these two exhibits, 16 and 17, would  
5 reflect then your handwritten notes presumably about  
6 what the terms of the deal were going to be between  
7 Fisher & Young and Kinkead, correct?

8 A Yes, that's the way it looks.

9 Q All right. And then you started, I'm  
10 sorry, I got you out of order, you are starting on No.  
11 16, Exhibit 16?

12 A Right.

13 Q Indicates, unless I've got them backwards  
14 now in my mind -- that's the one. 16 then has deed  
15 \$25,000, E&R, the timber?

16 A Right.

17 Q What does E&R stand for?

18 A Excepting and reserving timber.

19 Q Okay. So there is going to be a deed  
20 created. The consideration is going to be \$25,000 and  
21 the timber from that property is going to be excepted  
22 and reserved, correct?

23 A Right. Then there is a separate agreement  
24 for the timber.

25 Q Okay.

1       A       And maybe that would enter into the  
2 thinking at least, I don't know.

3       Q       Okay. I guess back before this deal is  
4 struck, there is some discussion about how the deal is  
5 going to be structured and what the consequences to  
6 either party is going to be given any particular  
7 option, is that correct?

8       A       Yes, I would assume that's correct. That  
9 would be a normal consideration.

10       Q       All right. And if the deal is done in two  
11 separate transactions, there is a transfer of the land  
12 excepting and reserving the timber?

13       A       Right.

14       Q       And then a second transfer of the timber,  
15 that's either going to result in the payment of a  
16 transfer tax on the total of the land and the timber  
17 or it's going to result in transfer tax on the  
18 purchase price of the land?

19       A       Deed, yeah.

20       Q       And a personal property tax on the value of  
21 the timber, is that correct?

22       A       That's right, that's true, yeah. That  
23 would enter into their negotiation, I would think.

24       Q       All right. And that, I guess from what you  
25 have written on your paper was probably 4 mills?

1 Q Okay. So your notes then would contemplate  
2 an installment sales agreement --

3 A Yes.

4 Q -- between Kinkead and Fisher & Young.

5 Kinkead obviously not having been paid the full  
6 consideration in the event that Fisher & Young would  
7 timber the property before they paid off --

8 A Yeah.

9 Q -- their installments. If they cut timber,  
10 they would pay --

11 A That's right.

12 Q -- to her until she has been satisfied?

13 A That's right.

14 Q Okay.

15 A Now, she wasn't paid off incidentally at  
16 the time Carlisle bought this property. She had not  
17 been paid off. But she was at the time that Carlisle  
18 bought from Fisher & Young, Fisher & Young had to of  
19 course be in a position to give her good title to the  
20 timber. So they had to pay Kinkead and get her  
21 settled up right then.

22 Q The next line is kind of grouped together  
23 with pay for timber cut, will not pay for buildings  
24 and land sold. Do you recall what that was?

25 A Well, as I mentioned there is huge barns

1   guessing again that they were saying that Fisher &  
2   Young wouldn't be able to cut the timber for more than  
3   10 years after they entered into this agreement with  
4   Mrs. Kinkead.

5           Q        Okay. So that would limit the rights that  
6   Fisher & Young would have in the timber to a period of  
7   10 years?

8           A        Yeah. But as I said before, of course,  
9   when Albert Carlisle got involved in all of this, then  
10   they had to make peace with Mrs. Kinkead, get her  
11   taken care of for whatever was owing to her because  
12   she wasn't going to be a party to the Carlisle  
13   transaction.

14          Q        Right. Okay. Below that we have appears  
15   heading title search.

16          A        Yes.

17          Q        And there is an arrow in the left hand  
18   margin. Do you recall what that refers to?

19                MR. HABER: The arrow or the whole thing?

20          A        The --

21          Q        The whole thing.

22          A        Says no notice of sale given. Oh, well, as  
23   I mentioned awhile ago about there was a tax sale of  
24   this property. As it was indicated here it was  
25   assessed to Levi S. Clough, that was the father of